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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

8963

FILE: B-192985

DATE: January 25, 1979

MATTER OF: GTE Sylvania Incorporated

A

DIGEST:

1. GAO declines to consider issues directly related to default termination, including alleged impossibility of specifications, because they are before contract appeals board. *are not for contract* Protester may not collaterally attack or argue same issues in two forums.
2. Even though issues related to default termination are before contract appeals board, GAO will consider whether reprocurement was properly conducted.
3. When defaulted contractor has stated that it cannot meet specifications which procuring agency considers essential, no useful purpose would be served by soliciting that contractor for reprocurement to same specifications.
4. Award of reprocurement contract to second-low bidder on original solicitation is recognized method of reprocurement, particularly when award is made at that bidder's price. *(2)*

CNG 00068
GTE Sylvania Incorporated (GTE), whose contract to supply the Federal Aviation Administration (FAA) *AGC 00030* with lamps to be used along airport runways was terminated for default, has protested the agency's award of a reprocurement contract to General Electric Company (GE). *CNG 00303*

GTE alleges that the reprocurement contract, like the terminated one, contains specifications which are impossible to meet. GTE further alleges that the reprocurement was improperly made on a sole source basis and that the specifications in question have been waived for GE. Even if GE is meeting the specifications, GTE argues, they exceed the FAA's minimum needs and therefore unduly restrict competition.

ALLEGATION THAT

[Bid Specifications ARE IMPOSSIBLE TO MEET]

023312

Decision

The lamps being procured are a component of Visual Approach Slope Indicator (VASI) systems used at airports throughout the United States. The systems consist of lamps with red and white lenses, mounted in holders in such a way that pilots of approaching planes can determine their proper altitude and slope from the color of light seen. Under adverse weather conditions and poor visibility, the FAA states, the slope indication provided by the lamps is essential, and without it a facility is considered "out."

Solicitation No. AC3A-8-0428, issued February 23, 1978, included a drawing which specified outline dimensions for the lamps. It differed from previous solicitations for the same lamps in that it contained the following note:

"THE LAMP SHALL CONTAIN A HOLD-
ING LEDGE THAT IS NORMALLY A PLANE
SURFACE OF 3/32" MINIMUM FLAT."

The FAA states that the note was added because of problems encountered by some field installations with replacement lamps delivered by GTE under a 1976 contract; they either could not be mounted properly or would not remain in the correct position after mounting because they lacked a flat holding ledge required by a relatively new type of lamp housing (which had been designed using lamps from GE, the agency's only previous supplier). The FAA states that the note was intended to clarify the requirement for a holding ledge, to insure that all replacement lamps would be compatible with all housings, and to allow competition by manufacturers other than GE.

At opening on April 12, 1978, GTE was the low bidder for an estimated annual quantity of 13,800 lamps at a fixed unit price of \$13.95 each. The firm was requested to and did verify its bid, and was awarded an annual, indefinite quantity contract (with a minimum guaranteed annual quantity of 13,800 lamps) on May 22, 1978. According to the FAA, GTE did not question the specifications or seek clarification of the note at any time before award. In June 1978, however, the firm began discussions with FAA regarding the need for

a change in the specifications or waiver of the holding ledge requirement. These were not granted. GTE subsequently informed the FAA that it could not meet the specifications, and the contract was terminated for default on August 8, 1978.

Due to GTE's failure to deliver (the FAA had refused to accept 3,250 lamps which had been produced but which GTE acknowledged did not meet specifications), only one month's stock was on hand at the time of default, and back orders existed. Finding this shortage critical, the FAA determined that the reprocurement should be negotiated pursuant to 41 U.S.C. 252(c)(2) (1976) by telephoning the other two bidders on the original solicitation, GE and Connecticut International Company, a dealer. The latter declined to submit a proposal, so a reprocurement contract for an estimated annual quantity of 24,000 lamps was awarded to GE on September 11, 1978, at its original unit price of \$15.60. This contract, like GTE's prior contract, was awarded on the basis of a guaranteed annual quantity of 13,800 lamps. GTE protested to our Office upon learning of this award.

ACC-00029 ✓ GTE has appealed its default termination to the ^{DLG} Department of Transportation Contract Appeals Board. ⁰⁰⁷³⁷
The FAA argues that because the factual issues involved--whether termination was proper, whether GE is capable of and is meeting the specifications, and whether reprocurement costs should be assessed, in light of GTE's defense of impossibility--are the same as those in the bid protest, our Office should dismiss the protest. The agency cites Union Carbide Corporation, B-188692, B-191319 and B-191491, May 18, 1978, 78-1 CPD 380, in support of this position. GTE, on the other hand, argues that only our Office can decide whether the specifications, as interpreted by FAA, unduly restricted competition.

We agree with the FAA that our Office should decline to consider those issues directly related to the default termination, since they are before the Board. We do not believe GTE may collaterally attack the impossibility of the specifications or argue the same issues in two forums. See Chemical Technology, Inc.,

57 Comp. Gen. 431 (1978), 78-1 CPD 317, also cited by the FAA. However, we can and will consider whether the reprourement action was conducted in accord with applicable procurement procedures. Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD 117 and cases cited therein.

When a procurement is for the account of a defaulted contractor, the statutes and regulations governing procurement by the Government are not strictly applicable to the reprourement. Aerospace America, Inc., 54 Comp. Gen. 161 (1974), 74-2 CPD 130. In PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213, we stated that if a contracting officer decides to conduct a new competition for a reprourement, he may not ignore the regulations regarding competitive procurement. We did not, however, hold that a defaulted contractor has an automatic right to be solicited. A contracting officer has considerable latitude in determining the appropriate method of reprourement, provided his actions are reasonable and consistent with the duty to mitigate damages. Ikard Manufacturing Company, 58 Comp. Gen. , B-192316, November 1, 1978, 78-2 CPD 315; Hemet Valley Flying Service, Inc., supra.

Federal Procurement Regulations (FPR) § 1-8.602-6(b) (1964 ed.) states that if the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the legal requirements with respect to formal advertising are inapplicable. However, the use of formal advertising is encouraged except where there is good reason to negotiate and that reason is noted in the contract file. We believe the record supports the FAA's decision to negotiate under 41 U.S.C. 252(c)(2) (1976), the exception for public exigency.

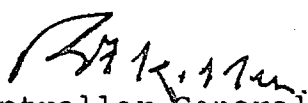
GTE alleges that the reprourement was improperly made on a sole source basis but, as noted above, two other firms which had bid on the original solicitation were invited to submit proposals for the reprourement. Only one of the firms, GE, submitted a proposal. Since GTE already had informed the FAA that it could not produce lamps meeting specifications which the agency

considered essential, we do not believe any useful purpose would have been served by soliciting the defaulted contractor. Award of a reprourement contract to the second-low bidder on the original solicitation is a recognized method of reprourement, particularly when the award is made at that bidder's original price. Hemet Valley Flying Service, Inc., supra.

As for whether the specifications were unduly restrictive, as GTE alleges, we have recognized that Government procurement officials, who are familiar with the conditions under which supplies and equipment have been and will be used, are generally in the best position to draft appropriate specifications. Consequently, we will not question an agency's determination of its minimum need, as expressed in specifications, unless there is a clear showing that the determination has no reasonable basis. Moore Business Forms, Inc., B-191963, August 24, 1978, 78-2 CPD 142.

In the instant case, the FAA has determined that the holding ledge called for by the specifications is the only method of insuring that replacement lamps can be properly mounted and that all replacement lamps will be compatible with all holders. In the absence of a Board finding of impossibility, we do not believe this determination has been shown to be unreasonable.

Accordingly, GTE's protest is denied.


Deputy Comptroller General
of the United States